

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 31 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0093
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
KENNETH JOHN FALCONE,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20052588

Honorable Hector E. Campoy, Judge

AFFIRMED

Law Offices of Cornelia Wallis Honchar, P.C.  
By Cornelia Wallis Honchar

Tucson  
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Appellant Kenneth Falcone appeals from his resentencing on convictions of one count of attempted sexual conduct with a minor in the second degree and two counts of sexual conduct with a minor, after the trial court granted Falcone relief on some of the claims he had raised in his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S.

738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), and asks this court to review the record for fundamental error. Falcone has filed a supplemental brief.

¶2 The history of this case has been set forth extensively in this court’s memorandum decision affirming the convictions and sentences on direct appeal, *State v. Falcone*, No. 2 CA-CR 2007-0055 (memorandum decision filed May 29, 2008), and our recently published opinion denying relief on review from the denial of some of Falcone’s claims for post-conviction relief, *State v. Falcone*, 228 Ariz. 168, 264 P.3d 878 (App. 2011). We need not, therefore, reiterate that history here. Briefly, this appeal follows Falcone’s resentencing on three convictions after the trial court granted partial relief requested in his petition for post-conviction relief and vacated convictions on other counts.

¶3 In her opening brief, counsel avows she has reviewed the record in compliance with *Anders* and *Clark* and “contacted the Arizona Department of Corrections, Time Computation Administrator pertaining to Appellant’s sentence,” but has found “[n]o arguable question of law.” In his supplemental brief, Falcone begins by criticizing appointed counsel’s *Anders* brief, characterizing it as “less than adequate” due in part to the fact that counsel never obtained a complete record of this case, only portions of the record related to the resentencing. In an appeal from a resentencing, however, the defendant can only raise issues that relate to the resentencing, not the trial. See *State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) (where underlying conviction previously affirmed on appeal, issues defendant can raise on remand for resentencing limited to resentencing). Consequently, counsel’s *Anders* brief,

which reflects that her review was limited to the resentencing, was appropriate. For the same reason, we will not address Falcone's assertions in his supplemental brief that the trial court gave the jury erroneous instructions, entitling him to a new trial.

¶4 In reviewing the record for fundamental error as requested, we have discovered a discrepancy in the record with respect to presentence incarceration credit. The transcript of the resentencing hearing reflects the trial judge noted that in preparing for the hearing, he realized the presentence report did not include the amount of presentence incarceration credit to which Falcone was entitled. The judge stated that although he had asked the probation officer "to provide [him] with an updated time credit calculation," he had performed his own calculations and had determined Falcone was entitled to 2,105 days' credit. When the judge actually imposed the sentence, he gave Falcone 2,101 days' credit, specifying that amount in the sentencing minute entry as well. Notwithstanding the discrepancy, based on the record before us that calculation appears to be correct. Although the record does not include booking sheets or other direct documentation of Falcone's incarceration, the final page of the Pima County Client Information Sheet, which apparently was prepared by the probation officer, states Falcone was arrested and incarcerated on June 13, 2005, and "released" on March 14, 2011, which is the date he was resentenced. Beneath this information the report provides Falcone should be credited with 2100, "Total Jail Days." There are 2,100 days between June 13, 2005, and March 14, 2011; thus, giving Falcone credit from the first day of his incarceration, *see State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993), the calculation of 2,101 days' credit is correct.

¶5 We have reviewed the entire record relating to the resentencing and have found no error, much less error that can be characterized as fundamental and prejudicial.<sup>1</sup> See *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (defendant entitled to relief for waived error only if error can be characterized as both fundamental and prejudicial). Therefore, the sentences imposed are affirmed.

/s/ *Garye L. Vásquez*

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ *Philip G. Espinosa*

PHILIP G. ESPINOSA, Judge

/s/ *Virginia C. Kelly*

VIRGINIA C. KELLY, Judge

---

<sup>1</sup>We note that Falcone has asked us to review the record for fundamental error pursuant to A.R.S. § 13-4035. But that statute, which had required this court to review the record in all criminal appeals for fundamental error, was repealed in 1995. 1995 Ariz. Sess. Laws, ch. 198, § 1. Nevertheless, we have conducted such a review as counsel and Falcone have requested, having assumed a defendant who appeals from a resentencing is entitled to such a review on direct appeal pursuant to *Anders* and its progeny.